BRIEF FOR DEFENDANTS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

Record No. 986.

THE BUFFALO AND JAMESTOWN RAILROAD COMPANY, PLAINTIFFS IN ERROR.

vs.

PATRICK FALCONER, et als.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

RICHARD P. MARVIN.

Attorney and Counsel for Defendants in Error.

JAMESTOWN, N. Y.

SUPREME COURT OF THE UNITED STATES.

THE BUFFALO AND JAMESTOWN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

PATRICK FALCONER AND OTHERS, DEFENDANTS IN ERROR.

CONCISE STATEMENT OF THE CASE.

Falconer and others, tax payers of the town of Ellicott, brought the action in August 1875, against the Buffalo & Jamestown Railroad Company, and Walter J. Weeks, Judson W. Breed, and Edward Jones, commissioners for bonding the town, and Robert Newland, to restrain them from making any subscription to the capital stock of said railroad company, and from issuing, or selling any bonds of the town, and the Railroad Company from receiving subscription to the stock, &c. Record, p. 9.

The complaint contains a statement of the proceedings, resulting in the appointment of the commissioners. It also contains statements, in brief, that the company had not, up to January 1, 1865, constructed its road into, or through, Jamestown:—also that no subscription to the capital stock of the Company for the town of Ellicott had been made, by the commissioners—and further that no bonds of the town had been invested in the stock or bonds of the road. It is also averred that the Railroad Company claims that the commissioners shall subscribe to the stock according to the agreement, (of June 14, 1872, set forth in the complaint) and that the commissioners give out and state that they will subscribe

to the stock, and deliver the bonds in payment for the stock. Prayer for injunction. Injunction order made and served. Record, p. 10.

The Railroad Company, by its attorneys, demurred to the complaint, and so did the commissioners by their attorney. Record, p. 11.

In May 1876 the court decided that the plaintiffs were entitled to the relief demanded in the complaint,—And adjudged a perpetual injunction. Judgment being entered, (See its record, p. 12.) the defendants by their respective attorneys appealed to the General Term of the Supreme Court, (Record, pp. 12 and 13,) and in June 1876 the said General Term of the Supreme Court, affirmed the said judgment. Record, pp. 13 and 14.

The Buffalo & Jamestown Railroad Company appealed to the Court of Appeals of the State. Record, pp. 14 and 15.

[NOTE.—*The Commissioners did not appeal.*]

In May 1877, the Court of Appeals affirmed the judgment in all things, and by order remitted the record to the said Supreme Court. Record, pp. 4 and 10.

The Buffalo & Jamestown Railroad Company brought the case here by a writ of error. Record, p. 1, assignment of errors, pp. 6 and 7.

POINT I.

As the Commissioners, Weeks and others, did not appeal from the judgment of the Supreme Court to the Court of Appeals, this court has no jurisdiction, as to the judgment of the Supreme Court, adjudging a perpetual injunction restraining the said Commissioners from

delivering, issuing or selling the bonds, * * and from subscribing to the stock of the company. * *

The judgment of the Supreme Court, is in full force and will so remain.

The Railroad Company was restrained from taking or receiving any subscription to its stock from the Commissioners, or any bonds of the town * * See Record p. 12.—Affirmance by general te[illegible] Record p. 14: Court of Appeals p. 16.

II.

When the action was commenced there was no valid contract existing between the Buffalo & Jamestown R. R. Company and the town of Ellicott, by its authorized agents, binding the town to deliver its bonds to the said Company, when the condition set forth in the petition of the taxpayers to the County Judge, should be performed, nor was there ever any such valid agreement.

III.

The agreement of June 14, 1872, between the Buffalo & Jamestown Railroad Company and Weeks and others, commissioners, &c., purporting to be made under the Act of 1869, ch., 907, and the laws supplementary, was not authorized by those acts, or any law, and was simply a nullity.

1. The agreement seems to have been drawn under the idea that the parties could substitute a contract in the place of the Statutes.

The only Statute authorizing any agreement is the Act of 1870, ch. 507. It will be proper to examine the Statutes with some care. See p. 12.

The Act of 1869, ch. 907, is an amendment to the General Railroad Act of 1850, its object being to permit municipal corporations to aid in the construction of railroads. The mode of aid is by creating and issuing bonds.

When the aid is authorized as provided in Sections 1, 2 and 3, of the Act, it is by the 4th Section made the duty of the commissioners, with all reasonable dispatch, to cause to be made and executed the bonds. (Describing them.) By section 5, the commissioners are empowered and directed to subscribe in the name of the municipal corporotion they represent, to the stock or bonds of the railroad company, named in such petition, (as the petition may direct,) to an amount equal to the amount of bonds so created by them, and to pay for the same by exchanging the bonds for them at par, or they may, at their discretion, sell or dispose of the said municipal corporation bonds so created by them, at rates not less than par, and invest the proceeds thereof in such stock or bonds of said railroad company as may be directed in said petition. (In this case the direction was to invest the bonds, or the proceeds thereof, in the stock of the company.) Here we have the powers and the duties of the commissioners clearly defined. The Act is imperative. The commissioners are *directed* to subscribe to the stock, or bonds, and to pay for the same by exchanging the bonds therefor, at par.

Let us now turn to the act of 1870, ch. 507, the only act authorizing any agreement by the railroad corporation and the commissioners for bonding the municipality. It is, by its title, an act to define the powers of commissioners, appointed under the Act of 1869. The Statute

is: "It shall be competent for any corporation, in aid to the construction of whose railroad, bonds shall have been authorized to be issued by any municipal corporation in this State, to enter into an agreement with the commissioners, appointed to issue said bonds, limiting and defining the times when, and the proportions in which, said bonds or their proceeds shall be delivered to said corporation, and the place or places where, and the purpose for which, such bonds or their proceeds shall be applied or used, and any such agreement in writing, duly executed by such corporation, and a majority of such commissioners, shall in all courts and places be valid and effectual. And such commissioners shall shall not be compelled by any court to deliver such bonds or their proceeds to such corporation, until such agreement shall be executed, if required, by them." Why was this statute enacted? To remedy what defect or evil? By the law, as it was, the commissioners were not only bound to subscribe to the stock of the railroad company, but to pay therefor in the municipal bonds, at the time of subscribing. The railroad company, having obtained the bonds, could use them, or their proceeds, in constructing any part of the road, though at a great distance from the municipality issuing the bonds, and then fail to complete the road. The bonds might be used to the great detriment of the tax payers of the municipality. This Act was intended to provide a remedy, by making it competent for the railroad corporation to enter into an agreement, with the commissioners, appointed to issue the bonds of a certain character, viz., "limiting and defining the times when, and the proportions in which said bonds or their proceeds shall be delivered to said corporation."

They may be regulated and controlled by the agreement and to this extent the act of 1869 is modified. The act of 1870 contemplates that the commissioners, if they make an agreement, should embrace in it the "place or places where, and the purposes for which, such bonds, or their proceeds, shall be applied or used."

It is very clear that the agreement is to be made at the time of subscribing to the stock, and the act declares "that such agreement in writing, duly executed by such corporation, and a majority of such commissioners, shall, in all court and places, be valid and effectual."

This provision is significant and important. The subscription to the stock, and the agreement, as to the matters authorized by the act, being made, it was important to declare such statutory agreement valid and effectual in all courts and places. And such agreement, authorized by the act, could be enforced by mandamus.

That this construction of the statute is the true one, is made clear, (if there were any doubt,) by the last sentence in the act:

"And such commissioners shall not be compelled by any court to deliver such bonds or their proceeds to such corporation, until such agreement shall be executed, if required by them."

Here is nothing said as to *subscription* to the stock, but the commissioners are not to be compelled to *deliver* the *bonds* or their *proceeds*."

A difficulty might arise, in case the commissioners should *require* that an agreement be made, and the parties should not be able to agree, and the Legislature attempted, by the act of of 1871, ch. 925, §5, to provide a remedy by reference to the question to the Supreme Court

to determine, upon what terms and conditions, said bonds shall be delivered to said railroad corporation," * * "and shall have power to compel the delivery of said bonds on such terms and conditions, and in such manner as it shall thus determine upon, by the usual process of the Court." Here is no word as to the stock, or of subscribing to the stock, but it is the bonds. This Section 5, of the Act is simply an addition to the Act of 1870. The stock should be subscribed for, and issued to the commissioners, in connection with the agreement, so that the municipality should be a stockholder and be represented at all meetings of such railroad and stockholders. An important right. See Act 1869, §5.

2. Let us now see what agreement was made, June 14, 1872, between Breed and others, commissioners for, &c., and the Railroad Company. (Record, p. 6.) After referring, by way of recital, to their appointment, the commissioners, do agree to and with, the party of the second part, that when the said party of the second part shall have located and constructed through the village of Jamestown, in said town of Ellicott, the proposed railroad of said Company, running from the City of Buffalo to the Pennsylvania State line, in the said County of Chautauqua, the said party of the first part, as such commissioners, or their successors in office, will thereupon immediately subscribe, in the name of the town of Ellicott, to the capital stock of the said Buffalo & Jamestown Railroad Company, to the amount of $200,000, and they will pay for the said stock, by delivering to the said company, the bonds of the said town of Ellicott, to the amount of $200,000, which bonds shall be made and executed by the said party of the first part,

or their successors in office, in due form of law, and by them duly signed, sealed, and certified. The agreement proceeds to state where the bonds shall be made payable; and in such denomination as shall be required by the party of the second part, not to exceed the denomination of $10,000, and shall bear date as of the time of such subscription, * * * * In consideration of the premises, the party of the second part, agree * * * that it will, in manner and form hereinbefore specified, receive the subscription aforesaid of * * and will receive in payment therefor the said bonds, * * * issued by the said commissioners in manner and form aforesaid, in due form of law, and will thereupon issue and deliver to the party of the first part, in due form, the certificates representing the amount of the capital stock so subscribed and paid for as aforesaid.

The concluding sentence seems to have been inserted, at the instance of the commissioners, to protect them from liability, in case they, in making the contract, exceeded their authority. There was no agreement to construct the road through Jamestown.

Town of Concord *v.* Savings Bank, 92 U.S. R., 630.

This agreement was made without any special reference to the Act of 1870. But it is obvious that the parties had before them the condition, in the petition of the tax payers to the County Judge, to be presently noticed.

The parties seemed to suppose that they could make an executory agreement to be performed upon the happening of a future event, and to provide, in that agreement, for a subscription to the stock, and the delivery to the company of the bonds, *in such denomina-*

tion as the company should require, not to exceed the denomination of $10,000. The company might, when the time came, require that the amount of each bond should be ten dollars. There are some other provisions, outside of any of the Statutes. The Railroad Company only bound itself to deliver certificates of stock, upon the subscription to the stock, and payment therefor in the bonds *created and issued by the commissioners in manner and form aforesaid*, in due form of law.

But these criticisms are quite unnecessary. It is very doubtful whether the attention of the parties was directed to the Act of 1870, of a single section. Most certainly they did not attempt to agree upon any item or matter specified in that Statute, "limiting and defining the *times when*, and the proportions in which, said bonds or their proceeds shall be delivered to said corporation, and the places where, and the purposes for which, said bonds or their proceeds shall be applied or used."

3. Let us now bring into the case the condition in the petition of the tax payer to the County Judge, a controlling element in the case. (See Record, p. 5.)

The petitioners express their *desire* that the town of Ellicott shall create and issue its bonds to the amount of $200,000, and *invest* the same, or the proceeds thereof, in the stock of the Buffalo & Jamestown Railroad Company, "upon the conditions that the line of the said railroad of said company, to be constructed from the city of Buffalo to the line of the State of Pennsylvania, in said county, shall be located and constructed through the village of Jamestown, in the town of Ellicott, before said bonds shall be delivered to said company, or sold." This condition was authorized by the act of 1871, amending

the act of 1869. Here we find the origin of the language used in the agreement, or rather, how that language came to be used, viz., in substance, that the commissioners agree that when the railroad company shall have located and constructed, through the village of Jamestown, in the town of Ellicott, the proposed railroad of the said company, running from the city of Buffalo to the Pennsylvania State Line, in the said county of Chautauqua, the commissioners will, thereupon, immediately subscribe, in the name of the town of Ellicott, to the capital stock, * * * * There is not the slightest reference to the act of 1870, or to anything in it. When the condition specified in the petition is performed, then the commissioners will *immediately* subscribe, and pay for the stock by delivering the bonds, * * * No notice is taken of "the *times*, (in plural) when, and the proportions in which, the said bonds, or their proceeds, shall be delivered." The *subscription*, and *delivery* of the bonds are to be simultaneous. This is taken from the act of 1869, "subscribe in the name of the municipality," (town of Ellicott,) * * and "pay for the same by exchanging the said bonds therefor at par." The agreement follows closely the language of the condition, without any reference to the specific provisions of the act of 1870.

This agreement effected no change in the rights of the parties. When the condition should be performed by the railroad company, it would be entitled to the bonds, and its remedy would be perfect, by mandamus. Was not such agreement simply *idle?* In the language of Folger, J., "It was of no avail." Record, p. 20, fol. 54.

"There was no contract to be impaired. A contract

should be clearly proved before it invokes the protection of the Federal Constitution."

Town of Concord vs. Savings Bank, 92 U. S. R., 630; and see the rule of construction of grants of power, etc., 11 Pet. 444; 13 How. 81. The construction is to be strict; any ambiguity in the terms of the contract must operate against the corporation, which can claim nothing but what is clearly given by the act.

4. Another broad answer to the entire case and argument of the plaintiff in error, is, that after the act of 1871 became a law, authorizing conditions in the petition of the tax payers, there was no longer any necessity, or propriety, of resorting to the act of 1870, in cases where the tax payers had made, as they could, their own terms. True, a case might happen in which the conditions would be so limited as to leave some room for an argument under the act of 1870, but such is not this case.

It so happens, in this case, that, the condition inhibited the delivery of the bonds, or their sale, until the hapening of a certain event, to wit: the construction of the railroad through the village of Jamestown. See the opinion of Folger, J., 69 N. Y. R. 495 and Record, p. 20.

In the mean time, until the event should happen, the powers of the commissioners were *suspended*. They could do no act, under the statutes, binding upon the town, and from the agreement made, it appears that they so understood, as all the parties promise to do, is to perform their legal obligations, at a future time, when the railroad company had performed the conditions.

5. Thus far the St[illegible] Statutes have been considered

independently of the construction given to them by the State Courts:

This court will follow the construction of the statutes, given by the Court of Appeals of New York.

See Boyd vs. Alabama 94 U. S. R 645—649.

The defendant claimed that his rights rested on a contract of the State, evidenced by a statute. The statute was repealed—the State Court decided that the statute, containing the contract, was unconstitutional, and this court followed the decision of the State Court.

See also, Scipio vs. Wright, 101, U. S. R., 665-675.

Township of Elmwood vs. Marcy, 92 U. S. R., 289-294.

Fairchilds vs. County of Gallatin, 100 U. S. R., 47, correcting, etc., Town of Concord vs. Portsmouth Savings Bank, 92, U. S. R., 625.

Douglas vs. County of Pike, 101, U. S. R., 677-686.

IV.

The agreement, if authorized, and of any effect or avail, when made, was not saved by the provision of the Constitution of the United States, inhibiting the states from passing a law, impairing the obligation of contracts, or, rather, this provision has no application to the case.

1. Whatever the contract was, it was not a common law contract between natural persons. If it was a contract made under the statutes, those statutes were, at all times, subject to repeal. The act of 1869, was an amendment to the general railroad act of 1850, "so as to permit municipal corporation to aid in the construction of railroads." The act of 1870 is an act to define the powers of commissioners appointed under the act of 1869, and

the act of 1871 amends the act of 1869, and is the act in which conditions, in the petition of the tax payers, are authorized. These acts constitute the system of municipal aid in the construction of railroads, incorporated.

By the Constitution of New york, 1846, Article 8, Section 1, it is declared that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the object of the corporation cannot be attained under the general laws. All general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed."

The statutes in question were enacted under this section of the constitution; and they were abrogated by an amendment of Article 8, adding Section 11, in these words:

"No county, city, town or village, shall hereafter give any money or property to, or in aid of any individual, association or corporation, or become, directly or indirectly, the owner of stock in, or bonds of, any association or corporation, nor shall any such county, city, town or village, be allowed to incur any indebtedness, except for county, city, town or village purposes. This section shall not prevent such county, city, town or village, from making such provision for the aid or support of its poor, as may be authorized by law."

2, The agreement, in question, depended upon the statute alone, for its force and validity, it was executory,—not executed—not performed. A statute repealed, is obliterated and regarded as though it had never existed except as to transactions passed and closed. Inchoate rights are gone. See Sedgwick on Statutes, &c., 129.

130, Butler vs. Palmer, 1 Hill, 329, *et seq.*, and the rule as stated by Tindal, Ch. J., in Key vs. Goodwin, 4 Moore and Payne 341, 351.

It is undoubtedly true that the provision of our United States Constitution prohibiting states from passing a law impairing the obligation of contracts, has brought into American law, a limitation of the broad rule of the common law, and here it may be necessary to inquire, whether a statute, repealing another statute, does impair the *obligation* of a contract.

3. In this case what was the contract? not the interpretation of the language used by the parties, but what were the elements in it? It was made, say, under certain statutes, the right to amend or repeal which, had been reserved or declared by the Constitution. It was therefore an element,—a condition, in the contract, that an end might be put to it, at any time before it had been performed, by abrogating the statute, upon which the contract depended for its validity and vitality. An end being put to the contract, the provision of the United States Constitution, as to its *obligation*, can have no application. This principal has been so often and firmly enunciated by this court, that it would be mere affectation to refer to the cases. But the Court will pardon a few references.

The history of the question, as a branch of American law, is very interesting. After the decision of this Court in Dartmouth College, vs. Woodward, 4, Whea., 418, many of the States, in creating a private corporation, reserved the power to alter, suspend or repeal the act. New York adopted this practice, and, inserted, in its revised statutes of 1830, a general provision, reserv

ing such right, and in 1846, (as we have seen above,) secured the right in its Constitution. It has never been doubted that the Legislature possessed the power to repeal laws enacted in pursuance of the provision of the Constitution, as to corporations, or amend them. See White vs. Syracuse & Ithaca Railroad Co., 14, Barb. 559. The Northern Railroad Co. vs, Miller 10, Barb. 277, and many other cases. This position is assumed by the Court of Appeals in this case. Opinion, record, pp. 17 and 21. Reported 69 N. Y. R., 495.

Among the first of the cases, in which the principle, as to the nature of the contract, was clearly enunciated, is Mathew vs. Bush 16, J. R. 233, in 1819, soon after the decision by this Court of Sturges vs. Cowninshield, 4, Whea. 133, and McMillin, vs. McNeil, *id.*, 209. The question arose under the insolvent laws of New York, in the absence of a bankrupt law, by which the insolvent debtor was discharged form the debt. It was argued, with great ability, by the most eminent counsel of the State; and the Court, by Spencer, Ch. J., enunciated the principle, that citizens of the same State entering into contracts, are to be understood as making them in reference to the existing laws of the State, and tacitly consenting, that the contract shall be governed, or modified by such laws.

The Mass. S. C. had asserted the principle in 1816, that the law where the contract is made, is a part of the contract. Blanchard vs. Russell, 13 Mass., 16. This court had not been agreed upon the question raised under the insolvent laws of the States; but in 1827 it decided that such laws were not laws impairing the obligation of contracts made subsequent to their passage,

* * * Ogden vs. Saunders, 12 Wheaton 213. See also Boyle vs. Zackaria, 6 Pet. 614, and Cook vs. Moffat, 5 How. 310.

The principle is, that the law of the place where the contract is made, or is to be performed, enters essentially into, and becomes a part of the contract. Cook vs. Moffat, 5 How. 312, 315, Bronson vs. Kinzie, 1 How. U. S. R. 315, a case where the law was enacted after the contract was made impairing the obligation. It was held that the *obligation* of the contract depended upon the laws as they stood when the contract was made.

In McLarin vs. Pennington, 1 Paige R. 109, Chancellor Walworth applies the principle to the repeal of a bank charter, the right to repeal having been reserved, and he refers to the insolvent law cases, with the remark that there would never have been any doubt as to their validity if the provisions of the insolvent laws had been actually incorporated in the contracts, as forming a part thereof. See also the recent case of Central R. R. Co. vs. Georgia, 92 U. S. R. 665, 670, a case in which chartered rights granted may be withdrawn, and a case in which the right could not be impaired by any legislative act, it not having been reserved.

4. This principle has been applied by this court, to cases where its decision had been made, and parties have acted upon the assumption that the law was settled, and made contracts, though it should subsequently appear that the court had given a wrong construction to the State laws. Ramond vs Runnels, 5 How. 134–139; Douglas vs. County of Pike, 101 U. S. R. 686; and cases cited.

V.

Is there anything further to be said in this case?

It cannot be necessary, as we apprehend, to say anything about the instrument, set out in the complaint, (Record, p. 7,) as having been signed by Allen and Newland, August 28, 1874, reciting that Jones, Breed and Weeks, (the commissioners) have placed in their hands, *as trustees*, the bonds of the town of Ellicott, executed by the commissioners, * * for certain uses and purposes, that is, if the railroad company shall, by January 1, 1876, have constructed its road to and through Jamestown, * * and upon the commissioners having subscribed $200,000 to the capital stock of said company and received the certificates of said company therefor, to deliver to the company the bonds, * * and in case the company shall not construct the road by the time, then they are to return the bonds to the commissioners.

The commissioners had prepared and signed bonds to the amount of $200,000, and August 28, 1874, placed them in the hands of Allen and Newland, and took from them the instrument or paper here referred to.

It would be idle to inquire what notions these commissioners entertained of their duties and powers,—and it cannot be necessary to remark upon their acts, wholly unauthorized by any law. It may be well to notice that it does not appear that the railroad company had any connection with the instrument signed by Allen and Newland.

This instrument concedes that no stock subscription had been made. It is all executory—executory.

VI.

It is supposed that the position of the plaintiff in error, will be assuming that this court should hold the

agreement of June 14, 1872, valid as authorized by the statute; that such agreement could not be affected by the constitutional amendment that took effect January 1, 1875, inhibiting the creation of debts, &c., &c.

This position, if taken, will be unsound, and without any authority to support it.

1. The agreement was executory to subscribe to the stock, at a future time, upon the happening of future events, and if authorized, it was, as shown in Point IV, subject to be revoked—put an end to.

Nothing short of an actual subscription to the stock and delivery of the bonds, could relieve the case from the effect of the State Constitutional inhibition.

In Aspinwall vs. County of Davies, 22 How. 364, proceedings had been had empowering the commissioners to subscribe for the stock, and issue the bonds; they neglected to execute the power until after the new constitution of Indiana, inhibiting subscriptions, &c., or loan, of credit, &c., and then subscribed to the stock and issued bonds. The court decided "that a subscription was necessary to create a contract binding upon the county, on one side, to take the stock and pay in bonds, and upon the other to transfer the stock and receive the bonds for the same. Until the subscription is made, the contract is unexecuted and obligatory upon neither party." And the court held "that the subscription was made and the bonds issued in violation of the constitution of Indiana, and therefore without authority, and void."

The County of Moultrie vs. The Buckingham Ten Cent Saving Bank, 92 U. S. R. 631, was much relied upon in the Court of Appeals, by the railroad company. It is not, we think, applicable to our case.

In that case the county was authorized to subscribe to the stock immediately, and issue bonds therefor, when the road should be opened for traffic between the places named.

The Court construed the action—resolutions—of the Board of Supervisors, as a subscription to the stock, in December, 1869. (The constitutional inhibition took effect July 2, 1870.) It is stated in the opinion, that the law gave to the county complete authority to make a subscription to the capital stock, not fettered by any conditions except as to the amount,—the payment to be postponed until the railroad should be opened.

The learned Justice adds: "And, of course, as a greater power, includes every constituent part of it, the legislative act empowered the Board of Supervisors to agree to subscribe, preparatory to an actual subscription."

No doubt is expressed in the opinion as to the action of the Board of Supervisors in December, 1869, and the opinion states that the resolutions adopted, "amounted to a subscription to the stock of the company, and created an obligation for the payment of the subscription in county bonds." p. 634. No subscription was actually made on the books of the railroad company until July, 1871, after the constitutional inhibition—when such subscription was made by the Chairman of the Board without any express authority, for the purpose of enabling him to vote at an election. The Court say, that a subscription on the books of the company was unnessary, for that which amounted to a subscription, had been made in December, 1869. The opinion proceeds to state how a municipal corporation may be bound by an ordinance, and that in that case, "the resolution to subscribe was its own act; its immediate subscription," cit-

ing many authorities, among them Nugent vs. Supervisors of Putnam County, 19 Wall. 241.—order of court —citing 11, B. Munroe 143—order of court.

We are unable to perceive what application this case has to our case.

The remark in the opinion that as a greater power includes every constitusnt part of it, the legislative act empowered the board of supervisors to agree to subscribe preparatory to an actual subscription, will, it is understood, be invoked in support of the position that the agreement in our case to subscribe at a future time, upon the happening of a future event, was binding, and to be protected by the Constitution of the U. S. Article 1, § 10, paying no regard to the right reserved of putting an end to the contract, while it was executory.

It will not be claimed that there was, by this contract, a subscription to the stock.

The pleadings show there was never any subscription. But has this remark of the learned Justice any application to any case other than a case where a municipality acts by the *resolution* of its board or order of court? I respectfully suggest that it was not intended to hold, as a rule generally applicable, that an agreement to do a thing authorized, is equivalent to the doing of the thing. A. is employed by B. to execute a conveyance of land and he enters into executory agreement to execute the conveyance at a future time, it will not be claimed that this is an execution of the power to convey. Is it not a rule that the power of attorney must be strictly followed, to bind the principal, and is not this especially so as to legislative grants of powers.

It may well be, that when a county acts by resolu

tion of a Board of Supervisors, that a resolution that the county *will subscribe*, or, as in the case of the County of Moultrie, referring to the law conferring the authority to subsribe, say, ordered, &c., that the county subscribed, &c., should be construed as a present subscription This is what the court did, and the language used in the opinion has reference to the case then under consideration. Boards of Supervisors act by resolution: County of Cass, vs. Gillett, 100 U. S. R. 590. The court acts by an order: County of Henry, vs. Nickolay, 95 U. S. R. 622.

But it is sufficient to say:

1. That in that case, the power to make an immediate subscription existed unfettered by any condition, except as to the amount. In our case the commissioners could not act until the condition in the petition of the tax-payers had been performed. This condition was law to them, and restricted their powers.

2. The power to repeal or alter the law authorizing the agreement, was not reserved. And it was provided in the new constitution that "all rights, actions, prosecutions, claims and contracts of the State, individuals and bodies corporate, shall continue to be as valid as if this constitution had not been adopted. (p. 636.)

3. It is conceded that had no subscription been made or engagement to subscribe entered into before the new constitution took effect, none could have been made after.

This, of course, means a valid engagement, resting upon a law not repealable. There can be no *pretence* of any such engagement in our case, and the inhibition in our constitution is express.

The Town of Concord, vs. Portsmouth Savings Bank, 92, U. S. R., 2 Otto, 625, is in point, though the court

may not have construed the provision of the constitution in that case correctly. See Fairfield vs. County of Gallatin, 100, U. S. R., 47, recently decided, and may have decided that particular case wrong, yet it is authority in our case, as there is no question of construction of the N. Y. Constitution; the *authority* given by the statute, was "*withdrawn.*" In that case, if the vote cast should be in favor of the appropriation, "*then the same shall be made.*" The vote was so cast, and the authorities, (towns, &c.,) were authorized and *required* to levy and collect a tax, &c. There was a proviso to the vote, that the company run the railroad through Concord, &c. The railroad company accepted by a written notice the donation which had been voted with the proviso. After all this, the new constitution of Illinois, was made, taking effect July 2, 1870, by which, as the court held, the authority to make a donation or appropriation was with drawn. The bonds in question were executed in Oct., 1871, and delivered to the company. This court held they were issued without authority, and were void. The court say in the opinion, p. 630: "If, then, the State Constitution prohibited donations to railroad companies, made after its adoption, the act of the legislature of 1867 became inactive after July 2, 1870. After that date the power no longer existed in the municipality."

VII.

If this Court should, for any cause, reverse the judgment, we suppose it will remand it to the State Court, to the end that the State Court may decide the questions, not Federal, but purely local, of exclusive State jurisdiction. Murdock vs. City of Memphis, 20 Wall. 598–636.

1. There is such question in this case. It was pre-

sented to the Court of Appeals thus: "The facts stated in the petition of the tax payers, were not sufficient to give jurisdiction to the County Judge; and all proceedings founded upon such petition are void. It does not appear, in the petition, that the Buffalo & Jamestown Railroad Company is a "railroad company *in this state*." See act 1869, ch. 907, §1, and act 1871, ch. 925, §1, and the People *ex rel* Rogers vs. Spencer, County Judge of Steuben County, 55 New York R. 1.

The *defect* in the petition in this case is the same as in the case just cited. [See Record, p. 5, the words, "in this State," after "such railroad company," are omitted.] This was the only question in the case, and the Court of Appeals held, unanimously, that these words were necessary in the petition to give the County Judge jurisdiction, and that the adjudication, directing the bonding of the town, was unauthorized, and the proceedings were reversed. The opinion by Andrews J., is fortified by numerous authorities.

2. No answer has been made to this point.

It has been suggested that the question was presented by *certiorari*, and so it was, but it raised a question of jurisdiction. It took the record into Court, and so the record in this case was brought into the Court of Appeals, and the railroad company stood upon it in that Court, and asserted rights; if it was void for want of jurisdiction in the County Judge, the railroad company had no rights. The question of jurisdiction may be raised at any time, when it comes directly in question. It was not collateral in the Court of Appeals.

3. It would seem from the opinion, that the Court of Appeals did not decide this question, but reserved it.

As I understand the decisions of this court prior to the amendment of the judiciary act of 1867, this court would, refusing to look into the opinion of the state court, and finding this question in the record, have affirmed the judgment upon the ground that the decision of the Court of Appeals may have been upon this very question, a question not within the jurisdiction of this court to review.

And, as I now understand, if this court should hold that the Federal question was erroneously decided by the Court of Appeals of New York, it will remand the case to the New York court to enable it to pass upon this question. If this is not so a party may be deprived of his legal rights, because the court, though making a final decision upon other questions, in his favor, neglected to decide a particular question. It is quite common for courts of last resort to *affirm* upon a single question, and leave all other questions unconsidered, not tarry to consider them.

RICHARD P. MARVIN,

Attorney and Counsel for Defendants in Error.

Jamestown, N. Y., Feb. 1880.

Revised December, 1880.

There is another record (No. 1059) in this Court, brought here by writ of error, allowed March 18, 1878, (the writ in the case of Falconer and others, was allowed August 21, 1877.) The title of the case in the New York Courts was :

THE BUFFALO AND JAMESTOWN RAILROAD COMPANY,
Plaintiff,
against
WALTER J. WEEKS, JUDSON W. BREED AND EDWARD P. JONES, Commissioners to issue bonds of the town of Ellicott and ROBERT NEWLAND, Defendants.

It is called "Agreed case and submission."

It contains the facts as in the case of the tax-payers, with slight immaterial differences, and the additional fact of the completion of the railroad through Jamestown in October 1875. The two cases have no connection with, or dependence upon each other, though they were submitted to the New York courts at the same time, and I have understood that it is the intention of counsel for the railroad company to submit them in this court together, upon one argument to this court. If so, it will be necessary that I should take some notice of this case.

1. If the case was authorized by law to be made, the decision must have been the same as in the case of the tax payers, Falconer and others, as the material facts are the same, and the same statutes and laws apply to it.

2. But this agreed case was simply a *nullity*.

There was no law authorizing it. The parties to it, assumed to make it under Section 372 of the New York Code of Procedure. See Record, p. 4. "A question in difference," &c. The section is: "Parties to a question in difference which might be the subject of a civil action, may, without action, agree upon a case, containing the facts, upon which the controversy depends, and present a submission of the same to any court which would have had jurisdiction, if an action had been brought."

"But, it must appear, by affidavit, that the controversy was real, and the proceedings in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case at a general term, and render judgment, as if an action were pending."

Weeks and others, commissioners, were agents of the town, for certain specific purposes, with limited authority, to be found in the statutes, which gave no authority to agree upon facts to be determined by the court, and such power would have been dangerous. The rights of the town might be stipulated away.

The *agreed* facts were not the subject of the *civil action* contemplated by the code, nor were the *parties* such.

Mandamus was the sole and adequate remedy of the railroad company, if at the time it had performed the conditions in the petition, it had a right to the bonds.

The Code, §471, as amended in 1863, preserves the remedy by mandamus. It declares, "until the legislature shall otherwise provide, the second part of this act shall not affect proceedings upon mandamus, or prohibition," &c. Section 372 is in the second part of the act, which begins with §69.

Any attempt to ascertain what views or notions the parties to this agreed case entertained, would be mere speculation. Perhaps they thought of a mandamus.

The plaintiff asks a judgment that the commissioners be ordered and directed to subscribe for, and receive the said $200,000 in stock of the said railroad company, &c. Perhaps they, or the defendants, thought of a bill in equity. They ask the judgment and *decree* of the court, declaring that they are not authorized in law to make such or any subscription, &c. See the Record, p.

10. They have inserted questions, (same p.) for which there was no authority in the code. This provision of the Code, §372, has been entirely misapprehended. It is simply a substitute for a *special verdict*, raising a question of law to be decided by the court, that is also to render judgment for one of the parties. It is a valuable provision, enabling parties, in a proper case, who can agree upon the facts, to obtain their rights cheaply.

It cannot be necessary to pursue these remarks. It may be well to say that the Supreme Court at General Term, could not upon this agreed case, adjudge a mandamus, which is a writ issuing out of the Supreme Court in the name of the People, (substituted for King in England,) upon the relation of the party aggrieved. The proceedings in N. Y. are regulated by statute. 2 R. S. p. 587.

I will refer to 3 Black. Com., 110, 111, Bacon's Abr, Title, Mandamus. The People *ex rel* Aspenwall vs. Supervisor of County of Richmond, 28 N. Y. R. 112, Dillon on Municipal Corporation, vol. 2, ch. 20, and sections 662-664.

It is the only remedy in a case like this. The statutes, as to bonding towns, are imperative.

No bill in equity, would be entertained by any Court of Chancery or Equity.

It is a rule, elementary, that the Court of Chancery has no jurisdiction of a case where there is a remedy at law. In Rees vs. City of Watertown, 19 Wall. 107, 121—124, the suit was by bill in Equity, which was dismissed on the ground that the court had no jurisdiction, as the remedy was by mandamus, 2 Dillon on municipal corporations, 685, and cases in notes.

3. What should be done with this agreed case? It is a nullity, and should be treated as such. This court

may dismiss the writ of error, or it may affirm the judgment, so called. The decision of the State Court was that the commissioners, (calling them defendants,) are not authorized in law to make any subscription to the stock, &c. See record p. 11. This was entirely correct and equivilent to a dismissal of the case. The Court of Appeals affirmed the judgment of the Supreme Court. It is referred to as a judgment. This was not material. The case was dismissed. See remittitur Record, p. 20. Thus the parties took the advice of divers able lawyers, and this was all there was of it.

NOTE.—It is probable that the attention of the New York courts were not called to the question of nullity.

4. The writ of error is frivolous, &c., &c. The record gives no jurisdiction except to affirm or dismiss the whole case. See Hubert College vs. Fitzhugh, 27 N. Y. R. 130, a case in point for dismissal by any court, a simple nullity. That was an agreed case, assumed to be made under §372 of the Code. The case went through the Supreme Court without objection, (as in this case) and the court rendered a decision, that is, it answered questions, and a judgment was entered, from which the defendants appealed. The question that the Code did not authorize the making of the case was not raised by counsel in the Court of Appeals, but by the court. The court reversed the judgment and dismissed the proceeding without judgment, and without costs to either party. See p. 136.

RICHARD P. MARVIN.